92-1848

Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

WHITWORTH BROTHERS STORAGE CO.,
Petitioner,

vs.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND
and
BOARD OF TRUSTEES, CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND
and
EXECUTIVE DIRECTOR, CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND
Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. DOES THE RECOGNIZED FEDERAL COMMON LAW ACTION FOR RESTITUTION OF AN EMPLOYER'S POST-ERISA MISTAKEN PENSION CONTRIBUTION ALSO EXTEND TO SUCH PRE-ERISA CONTRIBUTIONS? IN DETERMINING THAT QUESTION, IN THE FACE OF A CONFLICT AMONG SEVEN CIRCUIT COURTS AND THIS COURT'S HOLDING IN FRANKLIN v. GWINETT COUNTY PUBLIC SCHOOLS, 112 S.CT. 1028 (1992), SHOULD ERISA PREEMPTION BE USED AS A BASIS TO DENY ANY REMEDY OF RESTITUTION FOR UNJUST ENRICHMENT UNDER FEDERAL OR STATE LAW?

2. IN A FEDERAL COMMON LAW ACTION FOR RESTITUTION OF AN EMPLOYER'S POST-ERISA MISTAKENLY MADE PENSION CONTRIBUTIONS, DOES THE DENIAL OF INTEREST CONSTITUTE THE DENIAL OF A FULL REMEDY FOR THE RESTITUTION RIGHT? DOES THE DENIAL CONFLICT WITH THIS COURT'S DECISIONS IN FRANKLIN V. GWINETT COUNTY PUBLIC SCHOOLS, 112 S.Ct. 1028 (1992) AND UNITED STATES V. TEXAS, 113 S.CT. 1631 (APRIL 1993), ESPECIALLY WHERE ERISA DOES NOT SPEAK DIRECTLY NOR ABROGATES THE COMMON LAW REMEDY OF PREJUDGMENT INTEREST IN SUCH AN INSTANCE?

3. WHERE EXHAUSTION OF ADMINISTRATIVE REMEDIES THROUGH PENSION FUND TRUSTEES WOULD BE OBVIOUSLY FUTILE AND INADEQUATE, THE EMPLOYER'S REQUEST HAVING JUST BEEN ARBITRARILY AND CAPRICIOUSLY DENIED IN A PARALLEL SITUATION BETWEEN THE SAME PARTIES, ARE THE TRUSTEES ENTITLED TO SUMMARY JUDGMENT FOR THE EMPLOYER'S FAILURE TO EXHAUST SUCH A FUTILITY?

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EXECUTIVE DIRECTOR, CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND
Respondents

PETITION FOR WRIT OF CERTIORARI

Petitioner, Whitworth Brothers Storage Co. (herein "Whitworth Bros.") respectfully prays that this Court grant this Petition for a Writ of Certiorari to review portions of a judgment of the United States Court of Appeals for the Sixth Circuit entered on January 11, 1993.

On review of the district court's entry of summary judgment, the Court of Appeals affirmed in part and reversed in part, and limited the scope of Petitioner's federal common law action for recovery of mistaken pension contributions.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit is reported at 982 F.2d 1006 (6th Cir. 1993) and is herein referred to as "Whitworth II." That Opinion, the entry denying the Petition for Rehearing, and the District Court's unreported Opinion are reproduced in the Appendix to this Petition, pages 2a to 83a. An earlier opinion in this case was reported at 794 F.2d 221 (6th Cir.), cert. denied, 479 U.S. 1007 (1986) and is referred to herein as "Whitworth I".

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on January 11, 1993. The Court of Appeals denied Whitworth Bros.' timely petition for rehearing on February 16, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THIS CASE

The full text of the statutes involved in this case are set forth in the Appendix pages 83a-84a. These statutes are part of the Employee Retirement and Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. § 1001 et seq.:

29 U.S.C. § 1103(c)(1)
29 U.S.C. § 1103(c)(2)(A)(ii)
29 U.S.C. § 1144(a)
29 U.S.C. § 1144(b)(1)
29 U.S.C. § 1144(d)

STATEMENT OF THE CASE

William and Ernest Whitworth were co-owners, shareholders, officers, and employees of Petitioner, Whitworth Brothers Storage Co. ("Whitworth Bros."),[1] a family-operated business begun by their father. From 1955-1980 for William, and from 1955 to 1981 for Ernest, Whitworth Bros. made employer contributions to Central States, Southeast and Southwest Areas Pension Fund (herein "Central States"). Central States was originally one of the Taft-Hartley Funds and is a multiemployer employee pension benefit plan under ERISA. Since Whitworth Bros. began making contributions to Central States, Whitworth Bros. mistakenly believed that it was required to make

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[1]There are no subsidiary or parent corporations.

pension contributions pursuant to the terms of a collective bargaining agreement. Had William and Ernest been employees and not employee-owners they would have been entitled to a pension from their contributions.

William Whitworth sought to retire in 1979-1980 and requested pension benefits from Central States. Central States ultimately denied his request for a pension on the basis that William Whitworth was an owner and not an employee under ERISA.

William Whitworth retired in March, 1980. After that time, Whitworth Bros. made contributions only on behalf of Ernest Whitworth and no other employee. In mid, 1980, he had not received a pension and was asked whether he had the right to hire and fire while an employee

with Whitworth Bros. In November, 1980, Whitworth Bros. demanded that Central States either pay William Whitworth a pension or refund his pension contributions.

After a second demand by Whitworth Bros. and more correspondence, eight months later, on July 23, 1981, Central States acted. They denied a refund of contributions on behalf of William Whitworth from 1964 to November, 1979, totalling $7,506;[2] and they gave Whitworth Bros.'s account a $384.00 credit (from November, 1979 through March, 1980)

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[2]Central States based its determinations on its one-year refund policy, recently amended in view of the Multi-Employer Pension Plan Amendments Act of 1980; but their policy was adopted without any actuarial data or studies. R.56 [Whitworth Bros. Opposition to Central States' Motion for Summary Judgment, Response to Amended Interrogatory No. 9].

against future bills that weren't even owed.

Whitworth Bros. immediately ceased making pension contributions for Ernest Whitworth. Central States kept billing Whitworth Bros., threatened collection through letters and phone calls, and assessed interest and penalties. Whitworth Bros. filed suit in September, 1983 to obtain a refund and to declare the rights of the parties as to the un-owed contributions. Nonetheless, Respondent Pension Fund kept billing Whitworth Bros. through August, 1984. Appendix page 12a.

The District Court dismissed Whitworth Bros. case for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. On appeal, the Sixth Circuit reversed. Whitworth Bros. I, supra, 794 F.2d at 234-

236. The Court of Appeals held that an employer seeking a refund of mistaken contributions had no express or implied cause of action under ERISA. However, the Court held that Petitioner stated a federal common law claim for restitution, which arose under federal law. Thus, the Complaint was within the district court's subject matter jurisdiction under 28 U.S.C. § 1331.

On remand, Central States filed a Motion for Summary Judgment on the basis of a one-year employer refund policy in the Trust Agreement. Whitworth Bros. opposed summary judgment and supported its opposition with Central States' answers to interrogatories, stating that there were no studies or actuarial data of financial impact on Central States when the refund policy was adopted in December, 1980

retroactive to September, 1980. The district court concluded that the one-year refund limitation was reasonable because the Central States said it was reasonable. The one year refund policy was the basis for granting summary judgment on Whitworth Bros. claims for a refund of post-ERISA and pre-ERISA contributions. On Count III, whether Whitworth Bros. owed disputed contributions from August, 1981 to 1983 and interest, the District Court held that Whitworth Bros. did not owe contributions to the Pension Fund and entered judgment on Count III in Petitioner's favor.[3]

On appeal, the Sixth Circuit affirmed in part and reversed in part. Whitworth II, supra, 982 F.2d 1006, Appendix pages 63a-65a. As to post-ERISA contributions,

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[3]Central States did not file a cross-appeal on the District Court's determination in Count III.

the Court reversed the district court's conclusion that a one-year refund policy was reasonable. The Court held that a refund policy was arbitrary and capricious and inconsistent with principles of equity unless it was supported by actuarial data or financial data and it was necessary for the protection of the Fund, or there was some other compelling reason. The Court remanded for an evidentiary hearing on the reasonableness of the policy. Appendix pages 26a-56a.

The Sixth Circuit in Whitworth II held that federal common law restitution would only be available for the post-ERISA contributions of William Whitworth and that interest was not recoverable. Whitworth II, 982 F.2d at 1019, Appendix pages 61a-63a. The Court held that pre-ERISA contributions were not recoverable

at all. Appendix pages 24a-26a.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS ERRED IN DENYING PETITIONER ANY REMEDY TO RECOVER MISTAKEN PRE-ERISA PENSION CONTRIBUTIONS. THE SCOPE OF PETITIONER'S FEDERAL COMMON LAW REMEDY REQUIRES EXAMINATION OF THE SCOPE OF ERISA PREEMPTION, ESPECIALLY IN VIEW OF CONFLICTS AMONG SEVEN CIRCUITS OVER THE INTERPRETATION OF 29 U.S.C. § 1144(b)(1). ERISA PREEMPTION SHOULD NOT BE USED TO DENY ANY REMEDY.

In fashioning a federal common law action for restitution, the Court of Appeals ignored this Court's holding in Franklin v. Gwinett County Public Schools, __U.S.___, 112 S.Ct. 1028 (1992):

> "[W]here legal rights have been invaded, and a federal statute provides a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." Bell v. Hood, 327 U.S. 678, 684 (1946). The Court explained the longstanding rule as jurisdictional, and upheld the

> exercise of the federal courts' power to award appropriate relief so long as a cause of action existed under the Constitution or laws of the United States." Id., 112 S.Ct. at 1033.

The scope of an employer's federal common law restitution remedy for pre-ERISA contributions depends upon the scope of ERISA preemption. This Court should resolve a severe conflict among the Circuits over the scope of ERISA preemption where the cause of action arises post-ERISA, but acts or omissions occur pre-ERISA. Does federal law provide the remedy (preempting state law) or does state law remain a source for the remedy?

29 U.S.C. § 1144 provides, in relevant part:

> (a) Supersedure; effective date:
>
> Except as provided in subsection (b) of this section, the provisions of this subchapter. . .shall supersede any and all State

> laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title. This section shall take effect on January 1, 1975.
>
> (b) Construction and application
>
> (1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.
>
> * * * *
>
> (d) Alteration, amendment, modification, invalidation, impairment, or supersedure of any law of the United States prohibited
>
> Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(c) of this title) or any rule or regulation issued under any such law.

See Appendix page 85a.

Seven Courts of Appeals directly conflict in their interpretation of 29 U.S.C. § 1144(b)(1) and the scope of ERISA

preemption. Where a cause of action arises post-ERISA, but an "act or omission," occurs pre-ERISA (e.g., payment of mistaken contributions), it is unclear whether a uniform federal standard applies or the laws of fifty (50) states govern.

Judge Ryan summarized this conflict:

> "One view interprets the act or omission clause narrowly and treats the trustees' post-ERISA denial of a pension as the act or omission that is subject to ERISA and disregards pre-ERISA events. This has the effect of expanding ERISA preemption. The Third, Fourth, and Fifth Circuits have adopted this position. See Tanzillo v. Local 617, Int'l Bhd. of Teamsters, 769 F.2d 140, 144 (3d Cir. 1985); see also Rodriguez [v. MEBA Pension Trust, 872 F.2d 69 (4th Cir.), cert. denied, 493 U.S. 872 (1989)]; Wood [v. Marine Cooks & Steward Union, 642 F.2d 966 (5th Cir. 1981). Under this view, if the denial of benefits occurs after January 1, 1975, ERISA applies because the denial is both an "act or omission" and the accrual of the plaintiff's cause of action."

Stevens v. Employer-Teamster's Joint Council, 979 F.2d 444, 451 (6th Cir. 1992).

Three Circuits subscribe to the opposite interpretation of 29 U.S.C. § 1144(b)(1):

> "The other view interprets the act or omission clause broadly by examining the pre-ERISA events which often govern the trustees' decision. This has the effect of limiting ERISA preemption. Under this view, if the trustees' denial is based on events that occurred and plan provisions adopted before 1975, then the denial is not reviewable. The First, Second, and Ninth Circuits adopt this view. See Menhorn [v. Firestone Tire & Rubber Co., 738 F.2d 1496 (9th Cir. 1984)], see also Lamontagne v. United Wire, Metal & Mach. Pension Fund, 869 F.2d 153, 157 (2d Cir.), cert. denied, 493 U.S. 818 (1989); Quinn v. Country Club Soda Co., 639 F.2d 838, 841 (1st Cir. 1981).

Stevens, supra, 979 F.2d at 451.

A broad reading of ERISA preemption of state law for pre 1975 acts or omissions is justified on three policy grounds: 1) it furthers' Congress' intent to extend ERISA protection; 2) it has the advantage of certainty; and 3) it is more

equitable. Stevens, supra, at 451.

The narrow reading of ERISA preemption of state law for pre-1975 acts or omissions interprets the clauses "cause of action" or "acts or omissions" disjunctively because of the "or." This view is justified 1) it does not rob § 1144(b)(1) "or" of its meaning; 2) it does not apply ERISA standards retroactively.

After considering the Circuit split, the Sixth Circuit adopted the narrow preemption view in Stevens, supra.[4]

Justice White has stated that this conflict over the scope of ERISA preemption should be addressed and

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[4]Cf. Fisher v. Combustion Engineering, 976 F.2d 293, 297 & n.2 (6th Cir. Sept. 25, 1992)(Merritt, C.J.)(stating ERISA preempts without addressing what is left under federal law) with Id., at 299 (Ryan, J., dissenting)[reasoning no ERISA preemption and noting Circuit split under 29 U.S.C. § 1144(b)(1)].

resolved by this Court. McMonagle v. Northeast Women's Center, 110 S.Ct. 261, 263 (1989)[White, J., dissenting on the denial of writ of certiorari in MEBA Pension Trust v. Rodriguez, No. 89-206, 493 U.S. 872 (1989) and noting Circuit conflict.]

In Whitworth II, the Court denied any employer recovery for pre-ERISA contributions. 982 F.2d at 1012, Appendix pages 24a-26a. Whitworth II claimed it was following Crews v. Central States Southeast & Southwest Areas Pension Fund, 788 F.2d 332, 336-37 (6th Cir. 1986), but a careful reading of Crews shows that it provides no remedy at all, a position in conflict with other Courts, 29 U.S.C. § 1144(b)(1) caselaw, and with Franklin v. Gwinett County, supra.

If there is a remedy for pre-ERISA

contributions, certain factors are relevant. ERISA preemption of state law under 29 U.S.C. § 1144(a) is "deliberately expansive," and designed to "establish pension plan regulation as exclusively a federal concern." Ingersoll-Rand Co. v. McClendon, 111 S.Ct. 478, 483 (1990) (internal citation omitted). Because of this overriding preemption, federal courts have been encouraged to create federal common law remedies. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987).

The scope of ERISA preemption must also be read in tandem with 29 U.S.C. § 1144(d), which states that ERISA does not supersede other federal law. A claim for pre-ERISA benefits may be based under Section 301 of the LMRA, 29 U.S.C. § 185 Stevens, supra, 979 F.2d at 455-57 (which again presents a conflict with the

Whitworth II "no remedy" approach.)

The federal rules do not require legal theory pleading--only notice pleading of the facts. Fed.R.Civ.P. 54(c) requires that

> "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings."

Thus, in the context of a federal common law remedy that preempts, to some degree, state law, what is the scope of the cause of action, and what law governs?

In addition to the Circuit conflict addressed above, the issue is one of significant import beyond this Whitworth case. For a three (3) year period alone (1980-1983), Central States totally denied 157 refund requests out of 383 applications. $1,613,446 was involved of which $696,546 was unpaid. These numbers,

in view of the great number of pension funds, and dollars, may be only a small portion of the total amounts of dollars and employers subject to the same uncertainty that could be resolved by this Court's grant of certiorari and resolution of the issues.[5]

II. A FEDERAL COMMON LAW REMEDY FOR RESTITUTION, TO BE EQUITABLE AND MEANINGFUL, SHOULD INCLUDE PREJUDGMENT INTEREST. THE COMMON LAW PRESUMPTION HAS NOT BEEN OVERRIDDEN BY CONGRESS. TO DENY INTEREST IS TO DENY A REMEDY FOR THE RIGHT OF RESTITUTION CONTRARY TO THIS COURT'S HOLDING IN FRANKLIN V. GWINETT COUNTY PUBLIC SCHOOLS, 112 U.S. 1028 (1992) AND U.S. v. TEXAS, 113 S.CT. 1631 (April 5, 1993).

Under the common law of restitution,

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[5]Information was provided by the interrogatory answers of Central States in the District Court, which Court did not permit Plaintiff to further inquire about information for years earlier than 1980.

interest is normally required.[6] In pertinent part, the Restatement of Restitution § 156 states:

> "Subject to the rules stated in § 157, a person who has a duty to pay the value of a benefit which he has received, is also under a duty to pay interest upon such value from the time he committed a breach of duty in failing to make restitution if, and only if
>
> (a) the benefit consisted of a definite sum of money, or
>
> * * * *
>
> (c) payment of interest is required to avoid injustice."
>
> (Emphasis supplied)[7]

In addressing an employer's federal common law action for restitution of

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[6]"Interest, when not stipulated by contract or authorized by statute, is allowed by the courts as damages for the detention of money. . . to which the plaintiff is entitled." United States v. Texas, 113 S.Ct. 1631, 1637 n.1 (Stevens, J., dissenting)(noting common law rule).

[7]Accord, G. Bogert, The Law of Trusts, § 863 (2d ed. 1983); G. Douthwaite, An Attorneys' Guide to Restitution § 8.1 at page 326.

mistaken contributions, the Courts of Appeals have held that prejudgment interest is per se unavailable.[8] These Courts have justified this conclusion by broadly construing the anti-inurement policy of ERISA, 29 U.S.C. § 1103(c)(1),[9]

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[8]Whitworth II, 982 F.2d at 1019 (anti-inurement policy of ERISA bars interest), Appendix pages 61a-63a; Airco Industrial Gases, Inc. v. Teamsters Health & Welfare Pension Fund, 850 F.2d 1028, 1037 (3d Cir. 1988)(same); Kwatcher v. Mass. Service Employees Pension Fund, 879 F.2d 957 (1st Cir. 1989)(same); Dumac Forestry Services, Inc. v. Int'l Broth. of Elec. Workers, 814 F.2d 79, 83 (2d Cir. 1987)(denying interest but noting general common law rule allowing it); Peckham v. Board of Trustees of Int'l Bhd. and Allied Trades Union, 724 F.2d 100, 101 (10th Cir. 1983)(deferring to proposed treasury regulation barring payment of interest).

[9]Section 403(c)(1), 29 U.S.C. § 1103(c)(1) states, in pertinent part:

(c) Assets of plan not to inure to benefit of employer; allowable purposes of holding plan assets

(1) Except as provided in paragraph (2), (3), or (4) . . . the assets of a plan shall never inure to the benefit of any

narrowly construing 29 U.S.C. § 1103(c)(2)(A)(ii), as amended in 1980, and on the policy concern that an interest award might be costly to pension funds. Appendix at pages 62a-64a.

These Courts ignored the principle stated in Franklin v. Gwinett County Public Schools, ___U.S.___, 112 S.Ct. 1028 (1992). Coupled with this Court's intervening decision in United States v. Texas, 113 S.Ct. 1631 (April 5, 1993), the Court of Appeals below has ruled contrary to this Court's precedent. Franklin, supra, held that where federal law recognizes a cause of action (in that case, an implied one), the presumption is that all "appropriate relief" is

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employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan."

available. Franklin, supra, 112 S.Ct. at 1033. United States v. Texas, 113 S.Ct. 1631 (April 5, 1993) addressed whether prejudgment interest was an available remedy in federal common law actions, where the United States seeks recovery of debts from a state. The State of Texas argued that the Debt Collection Act of 1982, 31 U.S.C. § 3717 abrogated the common law rule requiring the return of interest.

Where common law remedies exist, Congress does not write on a clean slate. Rather, as this Court said:

> "courts may take it as a given that Congress has legislated with an expectation that the [common law] principle will apply except 'when a statutory purpose to the contrary is evident.'"

United States v. Texas, 113 S.Ct. at 1635 [quoting Astoria Federal Savings & Loan Assn v. Solimino, 501 U.S. ___, 111 S.Ct. 2166, 2168-70 (1991)].

To abrogate the common law rule,

Congress must "speak directly" to the question addressed by the common law. Statutory silence does not meet the "speak directly" standard. United States v. Texas, 113 S.Ct. at 1635.

The Texas case makes it clear that the Court of Appeals in Whitworth II, like most others, did not apply the proper analysis in a federal common law action. Whitworth II simply concluded that interest was barred by the anti-inurement policy. Appendix, pages 61a-63a. The Court did not examine common law remedies for restitution actions, or the equitable principles furthered by permitting prejudgment interest. Ironically, earlier in its opinion, the Court observed that Central States received a windfall (it did not have to pay pensions to William and Ernest Whitworth). It had been unjustly

enriched by its arbitrary and capriciously one year refund policy. Restitution is an equitable action. Appendix page 52a.

Section 403(c)(2)(A)(ii) of ERISA, 29 U.S.C. § 1103(c)(2)(A)(ii), which allows return of contributions for mistakes of fact or law, is silent as to prejudgment interest.[10] But the statutory language "mistake of fact or law" invokes the common law of restitution,[11] just as the use of trust terminology invokes the

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[10]Section 1103(c)(2)(A)(ii) states:

> "In the case of a contributions . . . (ii) made by an employer to a multiemployer plan by a mistake of fact or law . . . paragraph (1) shall not prohibit the return of such contribution or payment to the employer within 6 months after the plan administrator determines that the contribution was made by such a mistake."

[11]See Note, An Employer's Implied Cause of Action for Restitution Under Section 403 of ERISA, 54 Fordham L.Rev. 225, 244 n.133 (1985).

common law of trusts. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 110 (1989). Congress expressly used classic restitution language in § 1103(c)(2)(A)(ii), presumably aware of common law restitution remedies. The statute does not "speak directly" to interest and does not bar it as part of the "return of such contribution of payment." Since the statute does not abrogate the common law, prejudgment interest should be allowed.

The per se bar on prejudgment interest has created perverse, inequitable results. There is no incentive for pension funds to return mistaken contributions and quite an incentive to delay its return. There was also an incentive for Central States to demand contributions from Whitworth Bros. that weren't owed. Employers may be

better off not participating in pension plans. Although that would frustrate ERISA's purpose of promoting pension plans, Appendix page 53a, a small employer is foolish to ever deal with a pension fund like Central States, unless the law provides expected remedies for expected rights.

Finally, since a federal common law action for restitution would fall under 29 U.S.C. § 1144(d), ERISA should not bar the recovery of interest.

Since the Courts of Appeals have not heeded the import of Franklin, supra, and United States v. Texas, supra, this Court should address the issue.

III. THE COURT OF APPEALS ERRED IN RULING ON SUMMARY JUDGMENT THAT EXHAUSTION OF ADMINISTRATIVE REMEDIES WAS REQUIRED, WHERE THE EVIDENCE IN THE RECORD, AND THE COURT'S OWN OPINION, DEMONSTRATE THAT EXHAUSTION WOULD

HAVE BEEN FUTILE AND INADEQUATE. *RESOLUTION, ON SUMMARY JUDGMENT, WAS* IMPROPER.

The Court of Appeals in Whitworth II, 982 F.2d at 1018-1019, Appendix pages 56a -62a, affirmed the dismissal of restitution claims for mistaken contributions on behalf of Ernest Whitworth because Whitworth Bros. did not pursue administrative remedies with Central States prior to filing suit in 1983. This exhaustion theory was addressed, sua sponte, by the Court of Appeals in its decision in Whitworth II. Neither party briefed the failure to exhaust administrative remedies before the trial court, nor did the trial court address that issue. The District Court stated that Whitworth Bros. made demand on behalf of William Whitworth in November, 1980 and that the refund was denied in

July, 1981. The Court noted that no demand was made on behalf of Ernest Whitworth, except the lawsuit, and that recovery would be barred under the one-year refund policy (since the last contribution was made in July, 1981). Appendix page 77a.

Although the Sixth Circuit held that exhaustion was required, the Court ignored strong evidence in the record that exhaustion would have been futile. On review of summary judgment, the Court should have remanded this issue for the trial court.

Exhaustion of administrative remedies is not required where "exhaustion would be futile or inadequate." Honig v. Doe, 484 U.S. 305, 327 (1988)(emphasis supplied) [relying upon Smith v. Robinson, 468 U.S. 992, 1014 n.17 (1984)(citing cases)]. The

Court of Appeals ignored its own precedent, such as Shawnee Coal Co. v. Andrus, 661 F.2d 1083 (6th Cir. 1981) and City of Mt. Clemens v. U.S., E.P.A., 917 F.2d 908, 914 (6th Cir. 1990). An administrative remedy would be futile where:

> "an agency has made known that its general views are contrary to those of the complainant, and has never given an inkling that it would consider a matter afresh. . . ."

Id., 917 F.2d at 915 [quoting Etelson v. Office of Personnel Management, 684 F.2d 918, 925 (D.C.Cir. 1982)].

The doctrine is not linked to judicial power, but acknowledges "prudential considerations." Mt. Clemens, supra, at 914.

In their July 23, 1981 letter denying refund of the William Whitworth contributions of $ 7,506.00, Central States wrote:

"This denial is based upon the

> applicable provisions of the Internal Revenue Code and the Employee Retirement Income Security Act of 1974 as amended by the Multiemployer Pension Plan Amendments Act of 1980, Section 310. These provisions <u>are very restrictive in terms of those conditions under which refunds are permissible</u>.
>
> We hope you understand that your request was denied because the Central States, Southeast and Southwest Areas Pension Fund must comply with the federal law which governs the operations of Pension Funds."

(Emphasis supplied.)

Whitworth Bros. immediately ceased making contributions for Ernest Whitworth.

Discovery established that <u>no studies were done</u> to support Central State's conclusion that there were "significant" or "adverse" impact if contributions were refunded, and no actuarial evidence was used.

The Sixth Circuit agreed with the reasoning of several sister Circuits that a pension fund's refund limitation is

arbitrary and capricious unless the policy is based on actuarial data, necessary to the pension fund's financial stability, and comports with equitable principles. Whitworth II, 982 F.2d at 1016-18, Appendix pages 47a-55a. The Court remanded for factfinding determination by the trial court.

After the denial of a refund for William Whitworth, it would only have been futile to make a demand for the mistaken contributions for Ernest Whitworth. Central States had already made up its mind, written its arbitrary refund policy, refused to refund mistaken contributions, and continued demanding unlawful contributions.

Under proper standard of Fed.R.Civ.P. 56, the exhaustion issue was improperly resolved by the Court of Appeals, which

was not the trier of fact. Since the Court of Appeals has improperly deviated from the summary judgment standard under Fed.R.Civ.P. 56, this Court should hear this issue.

IV. THE COURT OF APPEALS IMPROPERLY UTILIZED EVIDENCE THAT WAS NOT PART OF THE RECORD IN THE TRIAL COURT AND CENTRAL STATES SUBMITTED FOR THE FIRST TIME ON APPEAL. THE COURT OF APPEALS ACTUALLY DENIED CENTRAL STATES LEAVE TO SUBMIT SUCH EVIDENCE BUT UTILIZED IT IN ITS OPINION TO THE PREJUDICE OF PETITIONER. SUCH USE VIOLATES FED.R.APP.P. 10, THE RULES ENABLING ACT, 28 U.S.C. § 2072(b), AND THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

At Appendix pages 12a-13a (footnote 5) and Appendix pages 58a-59a (including footnote 12) of Whitworth II, the Court of Appeals utilized factual evidence that was not part of the record on appeal.

Prior to filing its appellate brief in the Court of Appeals, Respondent

Central States filed a Motion to Strike or in the Alternative, to Supplement the Record on Appeal (herein "Motion to Strike or Supplement the Record"), along with the Brief of the Appellees. As a part of the Motion to Strike or Supplement the Record, Appellees attached the lengthy affidavit of James Burke and exhibits A-G. None of these evidentiary materials were ever filed in the District Court prior to judgment. Central States also improperly referenced, in detail, this new Affidavit and Exhibits throughout the Brief of the Appellees. Whitworth Bros. opposed same and cited authority for this position.[12]

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[12]See Fed.R.App.P.10(a)(only materials filed in the district court constitute the record on appeal); Richardson v. Blanton, 597 F.2d 1078, 1079 (6th Cir.)(affidavit filed after entry of judgment and notice of appeal not considered), cert. denied, 444 U.S. 886 (1979); Henn v. National Geographic Society, 819 F.2d 824, 831 (7th Cir.), cert. denied, 484 U.S. 964 (1987);

Prior to oral argument, the Court of Appeals denied Central States' motion to supplement the record.

Surprisingly, the Court of Appeals opinion utilized non-record evidence, and affirmed the judgment of the trial Court on the basis of this non-record evidence. Petitioner challenged this use in its Petition for Rehearing, which the Court of Appeals denied. Appendix, pages 68a-69a.

Specifically, the Court of Appeals used:

1) Central States is under a "self-reporting system" in which employer is responsible for

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Huelsman v. Civic Center Corp., 873 F.2d 1171, 1175 (8th Cir. 1989); United States ex rel. Bradshaw v. Alldredge, 432 F.2d 1248 (3d Cir. 1970)(Biggs, J.)["It is, of course, black letter law that a United States court of appeals may not consider material or purported evidence which was not brought upon the record in the district court."](Emphasis supplied).

notifying the fund of a change in employee status; Appendix pages 12a-13a; Contra page 5a (role of local union)

2) employers contributed on behalf of "391,000 employee participants between 1964-1981; Appendix page 59a;

3) it is "administratively impossible" to audit so many employers, Appendix page 58a-59a;

The only source of these "facts" is the non-record Burke Affidavit filed in the Court of Appeals.

Fed.R.App.P.10 safeguards due process principles under the Fifth Amendment. In a similar situation, Judge Easterbrook wrote:

> "The plaintiff's brief in this case was larded to citations to materials

> that were not before the district judge when he passed on the motion for summary judgment * * * * Counsel is wrong. See Fed.R.App.P. 10(a) (only materials filed with the district court are in the appellate record) * * * *. The parties may rely on appeal only on materials furnished to the district judge. Otherwise they deprive the opposing party of an opportunity to comment on them and the district judge of an opportunity to evaluate their significance.

Henn v. National Geographic Society, 819 F.2d 824, 831 (7th Cir.)(Emphasis supplied), cert. denied, 484 U.S. 964 (1987).

Whitworth Bros. had no opportunity to contest the self-serving affidavit of Burke. Such an opportunity would have adduced contrary facts for the Court to review. These "facts" were used by the Court of Appeals to justify affirming the district court's grant of summary judgment.

The Rules Enabling Act, 28 U.S.C. § 2072(b) requires that the Federal Rules be construed in a manner that does not

abridge the substantive rights of litigants. The federal rules are the product of careful study and review. Burlington Northern R. Co. v. Wood, 480 U.S. 1, 6 (1987). Following the plain meaning of the rule safeguards legal and constitutional standards. The Fifth Amendment, at its essence, requires a fair procedure and a minimum standard of fair play. The Court of Appeals has made an unwarranted departure from the federal appellate rules, enough to call for redress by this Court.

V. CONCLUSION

Because this case is worthy of this Court's attention, this Court should grant Whitworth Bros. petition for writ of certiorari.

Respectfully Submitted,

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